Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY, J. NETZER, Petitioner

Vs.

STATE OF WISCONSIN, Respondent.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals
For the IV District

PETITION FOR WRIT OF CERTIORARI

Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601
608-385-7247

QUESTIONS PRESENTED

1. IS IT A DENIAL OF THE CONSTITUTIONAL RIGHT TO COUNSEL AND THE CONSTITUTIONAL RIGHT TO DUE PROCESS IN A CRIMINAL CASE FOR THE TRIAL COURT TO ISSUE AN ULTIMATUM TO THE PETITIONER HEREIN, RANDY J. NETZER, TO EITHER FIND AN ATTORNEY IN ONE (1) BUSINESS DAY OR OTHERWISE FACE GOING TO TRIAL IN LESS THAN TWO (2) BUSINESS DAYS TO REPRESENT HIMSELF?

2. DO THE SPECIFIC ACTS AND/OR OMMISSIONS OF THE PETITIONER'S ATTORNEY IN THE INSTANT CASE, JOHN BRINCKMAN, RISE TO A LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT DENIED THE PETITIONER THE COSTITUTIONAL RIGHT TO COUNSEL AND THE CONSTITUTIONAL RIGHT TO DUE PROCESS?

3. WERE THE ALFORD PLEAS ENTERED BY THE PETITIONER'S ATORNEY IN THE PRESENT CASE, JOHN BRINCKMAN, AUTHORIZED BY THE PETITIONER, RANDY J. NETZER, AND, IN ANY EVENT, WERE SAID PLEAS KNOWINGLY AND VOLUNTARILY MADE BY PETITIONER?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Petitioner:
Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601
608-385-7247

2. Respondent:
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C/O Office of Wisc. Attorney General
Attention: Mr. Gregory M. Weber
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P.O. Box 7857
Madison, WI 53707-7857
608-266-3935

3. Respondent:
La Crosse Co. Dist. Attorney's Office
Attention: D.D.A. Loralee Clark
La Crosse County Courthouse
333 Vine Street
La Crosse, WI 54601
608-785-9604

4. Respondent:
Attorney John Brinckman
205 Fifth Avenue South, Suite 520
La Crosse, WI 54601
608-782-2777

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the highest state court to review the merits, from District IV of the Wisconsin Court of Appeals, appears at Appendix A to the petition and is unpublished.

The opinion of the Wisconsin Supreme Court, denying review, appears at Appendix C and is unpublished; Furthermore, the order of the Wisconsin Supreme Court denying reconsideration appears in Appendix D and is unpublished.

JURISDICTION

The date on which the highest state court, the Wisconsin Supreme Court, decided its ruling in the present case was April 20, 2004. A copy of that decision appears at Appendix C.

A timely petition for reconsideration was thereafter denied on May 11, 2004, and a copy of the order denying said reconsideration appears at Appendix D.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS

1. SIXTH AMENDMENT, UNITED STATES CONSTITUTION : In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and the cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

2. FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION; SEC. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law, nor deny to any person within its jurisdiction the equal protection of the law.

3. ARTICLE I. WISCONSIN CONSTITUTION, SEC. 7 : In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and the cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law.

4. ARTICLE I, WISCONSIN CONSTITUTION, SEC.8 (1) : No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment , nor may be compelled in any criminal case to be a witness against himself or herself.

STATUTES INVOLVED

5. SEC. 940.32(2), WIS. STATS.: Whoever meets all of the following criteria is guilty of a Class A misdemeanor:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family.

(b) The actor has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family.

(c) The actor's acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family.

6. SEC. 813.125(7), WIS. STATS: Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than $1,000.00 or imprisoned not more than 90 days or both.

7. SEC. 978.045(1r)(h), WIS. STATS: Section (1r) Any judge of a court of record, by order entered in the record stating the cause therefor, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury or John Doe proceedings or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exits: ...

> ...(h) The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

8. WIS. SUPREME COURT RULE 60.01(3): A judge should be temperate, attentive, patient, industrious and, above all, impartial. A judge should administer the law free of partiality and the appearance of partiality. To that end he or she should avoid membership in, or association with, an organization whose objectives, policies or activities are incompatible with the fair and evenhanded administration of justice.

STATEMENT OF THE CASE

This is a case which alleged in the original Criminal Complaint that the petitioner herein, Randy J. Netzer (hereinafter referred to either as petitioner or Netzer), had committed the following crimes:

1. COUNT I: STALKING: A Class A misdemeanor in the state of Wisconsin under Section 940.32(2), Wisconsin Statutes, which Section is provided in complete form as item 5 in the preceding section entitled "CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED" at page 4 - 5 herein;

2. Five (5) counts of violating a harassment injunction (COUNT II through VI), which the State of Wisconsin (hereinafter the State or Wisconsin or the respondent), the plaintiff in the underlying case and the primary respondent in this appeal, claimed in said Complaint that each of these counts was "contrary to Wis. Stat. Sec. 813.125(7)", which Section can also be found in its entirety in the preceding section herein as item 6 at page 5. However, as should be obvious on the face of Section 813.125(7), Wis. Stats., that section is solely a penalty section which does not define a criminal act. In all likelihood the State should have had to assert that Section 813.125(6), Wis. Stats. occurred in order to initiate a case for violating a harassment injunction. Section 813.125 (6), Wis. Stats. states as follows:

"SEC. 813.125 (6), WIS STATS. : A law enforcement officer shall arrest and take a person into custody if all of the following occur:

(a) A person named in a petition under sub. (5) presents the law enforcement officer with a copy of a court order issued under sub. (3) or (4), or the law enforcement officer determines that such an order exists through communication with appropriate authorities.

(b) The law enforcement officer has probable cause to believe that the person has violated the court order issued under sub. (3) or (4)."

3. COUNT VII: HARASSMENT: A Class A misdemeanor in Wisconsin under Section 947.013, Wis. Stats. However, more is not being discussed about this charge as said charge was dismissed as part of the process in this instant case.

The allegations of the Criminal Complaint are that the violations of the harassment injunction occurred between September 29, 2000 and October 10, 2000. The State alleges that the stalking was ongoing from May of 2000 through October 10, 2000.

Given that the blanket charge of harassment (count VII) and all of the violations of the harassment injunction (counts II through VI) are alleged to have occurred between September 29, 2000 when court records show that the harassment injunction was first issued and October 10, 2000, all of these allegations were before the injunction was issued to Netzer on or about October 17, 2000. Furthermore, the alleged timing of the stalking charge (count I), given that it alleges that this conduct began in May of 2000, would have occurred while Netzer was still dating the alleged victim, DeeAnn Nelton (hereinafter referred to as DN or the alleged victim) since the two were dating by mutual consent and in the public eye from February 2000 through July 2000.

Parenthetically, the alleged victim, DN, and Netzer met in September or October 1999 while both were at work. Since November of 1996 Netzer owned a title company in La Crosse County, Wisconsin and as such he needed to view real estate records at the La Crosse County Register of Deeds Office, tax records at the La Crosse County Treasurer's Office, and judgment records at the La Crosse County Clerk of Circuit Court's Office. Apparently DN moved to La Crosse sometime in 1999 and started working at the La Crosse County Clerk of Circuit Court's Office in the later part of 1999.

At all times during the pendency of this action and during the appeal process DN has worked for La Crosse County government, including not only the Clerk of Circuit Court's Office, but also for the La Crosse County District Attorney's Office. This circumstance is one of the reasons why Netzer has argued that there is a bias or at least the possibility for the appearance of partiality not only in the prosecution of this case, but also in the forum, being that this matter has been vigorously pursued by the La Crosse County District Attorney's Office, again--where DN was working, and moved along excessively quickly by the La Crosse County Circuit Court Judge, the Honorable Ramona A. Gonzalez. After Netzer and DN broke up in July of 2000, and months before their was an injunction, Netzer even instructred a member of his staff, Joe Brickman, to take as many of the La Crosse County files as possible because Netzer did not want to run into DN.

Netzer has consistently expressed his innocence to these charges --in both open court and in documents filed with the trial court throughout the many months since the commencement of this case. Netzer is licensed to practice law in the state of Wisconsin. Even though Netzer does not engage in the practice of law as he uses his legal background, generally, in real estate business matters, Netzer did initially try to defend himself in this case and made it clear to the court that he fully intended to take this case to trial. As one of Netzer's first steps to defend himself Netzer filed a Motion To Dismiss with a ten page affidavit and volumous attachments in order to both prove his innocence and expedite this case. This Motion To Dismiss, although being filed with the court on December 12, 2000 has never been scheduled for hearing by the trial court or heard by the trial court.

In late February or early March of 2001 a charge of bail jumping was joined in this case. This charge essentially was incorporated into the pending case as another act of violating the harassment injunction. Even before this incident Netzer had initiated inquiries with a few local attorneys and legal aid services to determine if outside counsel could help him with his case.In fact, Netzer had prior to this incident asked the court for a continuance to explore the possibility of retaining counsel but never got a response from the court; Yet when this incident occurred the State was able to immediately get a continuance from the court.

Given the State's continuance and Netzer's concern that the court was not listening to his side--with the deaf ear from the court with respect to the Motion To Dismiss and with respect to Netzer's earlier request for a continuance, Netzer began making as many appointments as he could to see local defense attorneys and Netzer made clear in each meeting that he was steadfast in his desire to take this matter to trial and was willing to pay an attorney to go to trial. Netzer's efforts at trying to retain an attorney between March of 2001 and the expiration of the State's continuance in mid-April 2001 and from then until mid-June when a two month continuance that Netzer was finally granted to retain an attorney expired, were not successful in finding an attorney for Netzer as it was unanimous among the attorneys in their response to Netzer that they would be willing to take the case but that they needed more time than the court was allowing. This situation is more completely dealt with in the ARGUMENT that follows.

When Netzer returned to the court in mid-June, after having written the court on several occasions earlier to keep the court informed about Netzer's continued interest and efforts to find an attorney, the court essentially gave Netzer an ultimatum to either hire an attorney within the "next 24 hours" in the words of Trial Judge Ramona A. Gonzalez, the Honorable Circuit Court Judge for Branch I of La Crosse County Court, or Netzer had the option of coming back to court in less than 2 business days to represent himself. Again, this issue is more fully detailed in the following ARGUMENT but the essence of this ultimatum was that Netzer could no longer retain an attorney of his choosing or even one that he felt was competent, but rather he had to hire an attorney because he knew that his mental state, his preparedness to present his own defense, and his own competence to practice criminal law virtually for the first time on himself were definitely going to be lacking for a trial if he had to be ready to defend himself therein with less than two business days to get ready.

Netzer ended up retaining Attorney John Brinckman to represent him so the court moved the trial date from two business days later to two months later--in August of 2001. Attorney Brinckman essentially became Netzer's attorney because of his persistence and availability. Somehow, almost immediately after the court issued its ultimatum to Netzer, Attorney Brinckman was on the phone to Netzer offering his services. Netzer knew that Attorney Brinckman was a defense attorney but he was one of the few defense attorneys in the La Crosse, Wisconsin area that Netzer had made no inquiries for his services. Netzer did not like Attorney Brinckmans's reputation and felt that Attorney Brinckman would not be a good advocate for Netzer's case.

Netzer did talk to several attorneys, however, that used to work with or for Attorney Brinckman or who were at one time or other associated with him including Margarita Van Nuland, whom Netzer would retained to represent him, but she was one of the attorneys that specifically told Netzer that she would be willing to take his case but the court's schedule and her own schedule did not allow the necessary time for that to happen.

When Netzer retained Attorney Brinckman it was with the clear articulation that Netzer wanted to go to trial and Netzer believed in his innocence. Netzer told Attorney Brinckman that he was ready, willing and able to meet with Attorney Brinckman at any time. Netzer further tried to help Attorney Brinckman by providing names and addresses of witnesses and information about evidentiary sources. And Netzer requested that Attorney Brinckman file motions on Netzer's behalf because Netzer felt there was merit to bringing some things to the courts attention. Much of this was not followed up on and Attorney Brinckman did not exhibit any initiative to use his criminal defense experience to identify additional resources for the defense which Netzer was not able to identify at the time, such as additional witnesses that Netzer had not named or thought of, but whom an experience defense atorney might identify from listening to Netzer's recount of events pertinent to this case.

Ultimately, three (3) business days before trial Attorney Brinckman had not yet fully interviewed Netzer, had not yet subpoenaed or prepared a single witness for trial, had allowed exculpatory phone records and possibly other discovery to be lost and never had even filed a motion to even limit the court case let alone to have it dismissed. Netzer was caught off guard by this and mentally and emotionally at risk.

Attorney Brinckman used what was suppose to be one of the last prepatory sessions with Netzer before trial to instead pressure Netzer to take a plea bargain. Netzer had never authorized Attorney Brinckman to engage in any discussion with opposing counsel about a plea bargain, but apparently Attorney Brinckman had on his own initiated such conversations with Deputy District Attorney Loralee Clark, of the La Crosse District Attorney's Office, as representative of the State. This sudden series of events and Netzer's diminished mental and psychological state contributed to create confusion and doubt in Netzer's mind, quite frankly. Netzer always felt that there was not a factual basis for the charges against him but this series of events created doubt and distrust on Netzer's part toward Attorney Brinckman and resulted in a sort of momentary dispassion on Netzer's part, for the first and only time, with respect to the criminal charges.

Now, what was suppose to be a trial on August 28, 2001, where Atorney Brinckman was suppose to be dealing with all of the issues, like bringing forward witnesses and presenting exculpatory evidence, etc. , and where this nightmare was finally going to be over, turned into a plea hearing. Attorney Brinckman appeared at that hearing with Netzer and the court actually directed its request for an entry of plea to Atorney Brinckman who voiced an Alford Plea to one count of stalking by the defendant, Randy J. Netzer, and an Alford Plea to one count of violating a harassment injunction. Netzer never was asked to enter his own pleas or to ratify the pleas made by Attorney Brinckman.

Netzer did engage in a long statement where he attempted to make it clear that he did not believe there was a factual basis for any of the charges against him, that he tried to point this out previously to the court with filed Motions To Dismiss, etc., and that he was disappointed that his attorney did not file any motions, did not prepare witnesses, and allowed exculpatory evidence to be lost or destroyed. Netzer did not even believe as he sat in that hearing that the court would be able to enter any conviction because of the lack of factual basis and because of the diminished mental and psychological state that Netzer was in which included several attempts to commit suicide due to these false charges.

REASONS FOR GRANTING THE PETITION

1. ARGUABLY, IT IS A DENIAL OF THE CONSTITUTIONAL RIGHT TO COUNSEL AND THE CONSTITUTIONAL RIGHT TO DUE PROCESS IN A CRIMINAL CASE FOR THE TRIAL COURT TO ISSUE AN ULTIMATUM TO THE PETITIONER TO EITHER HIRE AN ATTORNEY IN ONE BUSINESS DAY OR FACE GOING TO TRIAL WITHOUT AN ATTORNEY IN LESS THAN TWO BUSINESS DAYS.

Netzer had been vigorously defending himself for 8 months in large part because of a sincere belief in his innocence -- that he had not stalked or harassed the alleged victim, DN, as he had no contact with DN and did not even attempt any phone calls to her, etc. after they broke up in July of 2000. Netzer's beliefs were to some degree outlined in 2 Motions To Dismiss that Netzer filed on his own behalf after this case commenced.

Even though Netzer is licensed to practice law in Wisconsin, he has never conducted a criminal trial and has not actively practiced law since 1986 when he got into the real estate business. That is why, within 4 months of the commencement of this case Netzer began making inquiries of attorneys to see if he could find someone to represent him. Besides Netzer's lack of legal expertise in this area, Netzer grew concerned with the fact that the alleged victim worked for La Crosse County and was friendly with the judge and the prosecutor in the case. Moreover, Netzer had never gotten any kind of action from the trial court in response to his filed Motions To Dismiss, not even a future hearing date. Also, given the relationship of the alleged victim to the court and to the prosecutor it seemed reasonable to Netzer that a change of venue to an entirely different court outside of La Crosse and a substitution of a special prosecutor were appropriate, especially given that Wisconsin Supreme Court Rule 60.01(3) requires judges to strive to take necessary steps to avoid even the appearance of partiality (Please see Rule 60.01(3) which is stated in its entirety at item 8 at page 6 herein) and Section 978.045(1r)(h) allows a court to so order and a district attorney to so request a substitution of the prosecutor in a case to avoid any conflict of interest involving the attorneys or staff, but Netzer did not believe that this trial court would give serious consideration to such an idea if it came from Netzer himself.

Netzer's concerns about being competent to represent himself were also voiced by the prosecutor, Deputy District Attorney Loralee Clark of the La Crosse County District Attorney's Office.

The first time this was evident was when Netzer questioned the jurisdiction of the trial court because he had not received a preliminary hearing and Clark informed Netzer that the charges were all misdemeanor charges which, therefore apparently, do not require a preliminary hearing under Wisconsin law; so Clark suggested at that instance and at other times -- when Netzer suggested on his own that he wanted to hire an attorney -- that he be afforded an opportunity to do so.

An attorney was also necessary for Netzer because the charges were causing a great depression in Netzer. This manifested itself in the fact that Netzer was having a hard time doing normal day to day things like simply getting out of bed or going to work. Netzer was seeing a psychologist to help him deal with this depression, Mr. Jeffrey Court. However, during the pendency of this case one of Netzer's ways to deal with the depression was to read the book Final Exit, by Derek Humphreys which led Netzer to get in contact with Mr. Humphreys to talk about how to go about peacefully committing suicide so as not to indirectly hurt anyone else, etc.Suicide became an option to going to trial for something Netzer felt was unjustified and an option to doing the things necessary to prepare for a trial where other peoples reputations or feelings might be hurt.

In any event Netzer eventually engaged in face to face discussions with Attorney Ellen Thorne on one occasion, and Michael Devanie on another --both meetings lasting almost an hour and one half. Then Netzer met with Attorney John Matousek on a few occasions, each lasting more than an hour, and on one occasion Mr. Matousek even called the clerk of Judge Gonzalez and D.D.A. Clark to reschedule a court date and to get permission to access Netzer's file.

For nearly a month, then, not only Netzer, but D.D.A. Clark also believed that Attorney John Matousek was going to represent Netzer; However, sometime in May Attorney Matousek notified Netzer that the court's fast track trial schedule for Netzer's case did not afford Matousek sufficient time to handle the case. So, Netzer continued to call other attorneys and met with Attorneys such as Margarita Van Nuland who he wanted to represent him but a day after their interview Attorney Van Nuland said, just as Attorney Matousek had said, that the court's schedule did not afford sufficient time for her to prepare the case. All through this process Netzer kept writing to the court to inform the judge of Netzer's search for an attorney and to try to get more time before trial so that maybe even one of the growing number of attorneys that were aware of the case might be able to find enough time to handle the case. Judge Gonzales response to this was at a hearing on a Thursday in mid-June where she essentially gave Netzer an ultimatum to either represent himself at trial the following Monday--less than 2 business days away--or hire an attorney by 3P.M. the next day--Friday. So Netzer called back all of the attorneys he had wanted to represent him before, including Attorney John Matousek, Attorney Margarita Van Nuland , Attorney Ellen Thorne, Attorney Michael Devanie and his partner Keith Belzer, and then Netzer went right through the yellow pages frantically trying to find an attorney, but with such short notice there were many attorneys who were unavailable--in court or on vacation or overbooked--so Netzer was not able to meet with them. Among the attorneys Netzer was able to reach he got the same story from all of them, including Kenneth Peterson, Cheryl Gill, Dan Ryan, James Thibodeaux, and Mark Huesmann, that the 2 months before the proposed trial date in August of 2001 was not enough time to prepare Netzer's case.

Netzer also tried to reach or had brief conversations with the following without being able to find an attorney, including: Timohy Guth, Margaret Ahne Herlitzka, Maureen Kinney, and Kara Burgos.

As noted in the STATEMENT OF THE CASE earlier, Netzer thusly ended up with Attorney John Brinckman representing him because Attorney Brinckman kept on making unsolicited calls to Netzer saying he could represent Netzer and Netzer could not find anyone else. Netzer knew that he was not ready to represent himself without notice as the court outlined as his only other alternative. And Netzer wanted to voice his defense because he believed in his innocence and he believed that a competent attorney could show that the charges in this case were not only unjustified but that there were false statements or false information in the Criminal Complaint and in the court file that even the prosecutor was aware of.

Both the U.S. Constitution, at the Sixth Amendment, and at the Fourteenth Amendment, and the Wisconsin Constitution at Section 7 of Article I insure a defendants right to counsel in a criminal case. In Chandler v. Warden, 348 U.S. 3, 75, S. Ct. 1 (1954) the trial court judge made a note that the defendant had had from January to May to find his own attorney but did not and denied the defendant the right based thereupon to choose his own attorney; However, the U. S. Supreme Court overruled the trial court and stated "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel. Id. at p. 10, p. 5, respectively. It is argued in the instant case that for Judge Gonzalez to only afford Netzer one business day to hire an attorney is unreasonable and violative of the rights protected in our constitutions and in Chandler.

It should also be noted that in the past the U.S. Supreme Court has emphasized that when a trial court rushes a defendant's case to trial, so as to not afford whoever represents the defendant enough time to prepare, as may be the explanation why Attorney Brinckman was not prepared to take the instant case to trial (I.e., no prepared/subpoenaed witnesses, no motions filed, etc.), it is also inappropriate and deprives a defendant of the right to counsel, as the court stated in White v. Hagen, 324 U.S. 760, 764, and 65 S. Ct. 978, at 980, (1945)" it is a denial of the accuser's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."

Arguably, in the instant case, by forcing Netzer to retain an attorney not of his choosing on such short notice and in the threatening, iron-fisted manner that the trial court did in this case, and by not affording Netzer's attorney enough time to prepare, as appears to be the consensus of opinion of the many attorneys that Netzer tried to retain and was ready, willing and able to retain, but for the court's condensed schedule, the trial courts actions deprived Netzer in essence of counsel. This happenstance is akin to what happened in Avery v. State of Alabama,308 U.S. 444, 60 S.Ct. 321 (1940) wherein the court stated: "But that denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment into a sham .....The Constitution's guarantee of counsel cannot be satisfied by mere formal appointment."

2. THE ACTS AND/OR OMISSIONS OF THE PETITIONER'S ATTORNEY RISE TO A LEVEL OF CONSTITUTIONALLY DEFECTIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

From the outset of Attorney Brinckman's representation of Netzer's case he was informed by Netzer that Netzer believed in his innocence and wanted to take the matter to trial. Attorney Brinckman was made aware of the specifics of repeated plea bargains offered by the prosecutor which Netzer made clear he had not solicited and did not want any part of.

Netzer informed Attorney Brinckman that Netzer had filed 2 Motions To Dismiss already which the court still had not heard and Netzer wanted Attorney Brinckman to file more motions, including a new Motion To Dismiss, because among other things the Criminal Complaint 1. failed to recite a statute that cited criminal action with respect to the violation of a harassment injunction since the Section referenced in the complaint--Sec. 813.125(7) is merely a penalty provision --and,2. in any event all of the alleged harassment was said to have occurred before Netzer received an injunction and 3. none of those alleged violations of the harassment injunction clearly specify that Netzer was actually in close proximity to the alleged victim --because he was not, and 4. any of the times and places when and where Netzer was actually were appropriate because it is allowable under the Wisconsin law for someone to be engaged in conduct that has a legitimate purpose and is not focused on an unwanted course of conduct toward another.

Other things that Netzer was not aware of at the time because he was not an expert on the law is that stalking should never have been charged because none of the conduct or the mindset of Netzer rose to a level involving an air of concern over bodily injury or death to anyone and Netzer has no weapons and has never carried or possessed any weapons and has never verbally or physically threatened the alleged victim or any one she knows.

At their initial meeting Netzer also provided Attorney Brinckman with the names and addresses of at least a dozen witnesses that Netzer thought could help his case. For instance, 1. Both John Petry and Gary Macaulay, two good friends of Netzer, could attest to the fact that Netzer had good reason to visit West Salem, Wisconsin--where the alleged victim resided. Both Mr. Petry and Mr. Macaulay also both lived in West Salem for many years before DN and Netzer visited them there. Also, Netzer would help out John Petry and his brother Rich Petry, from time to time at the restaurant that they owned in town--"Features". Netzer would also go jogging with his friend John Petry on trials around West Salem; 2. Nancy Netzer, the petitioner's mother, lived with Netzer and she could attest to the fact that the alleged victim called Netzer rather than vice versa and Nancy Netzer could also attest to Netzer's emotional, mental, and psychological state or changes therein during and after the relationship with the alleged victim and during the pendency of court proceedings; 3. Former La Crosse County Assistant District Attorney John Berns could testify to discussions that it was acceptable for Netzer to continue to use the La Crosse County Register of Deeds Office as he had legitimately done in the past, even before the alleged victim worked for La Crosse County, as long as Netzer did not go near the alleged victim; and

4. Joan Mc Hugh and Deborah Flock from the La Crosse County Register of Deeds Office can testify to the fact that Netzer owned a title company and was legitimately using their offices for years before the alleged victim moved to town and started working for La Crosse County. Of course there are many more of these examples of people Attorney Brinckman should have contacted and prepared for trial and subpoenaed such as the people who saw Netzer and the alleged victim holding hands and dancing at a wedding on June 17, 2000-- contrary to the alleged victim's later statement that she was no longer dating Netzer since May of 2000, or the hostess at the Chateau La Crosse who served Netzer and the alleged victim as the only 2 people at the establishment that day for lunch.

Also, Netzer asked Attorney Brinckman to subpoena phone records. The phone records alone from Netzer's cell phone would show that the alleged victim called Netzer repeatedly and the only times he called her were right after she called him to return her call.

Those records would also show that the alleged victim called Netzer 7 times within a half hour in July 2000. And Netzer never called DN after they broke up.

Attorney Brinckman provided ineffective assistance of counsel to Netzer because he did not do any of the things Netzer had been asking him to do since the very beginning of their client -lawyer relationship. Attorney Brinckman failed to interview most of the witnesses that Netzer had handed to him and he never made any connections about other possible witnesses that may have been apparent to him but were not to Netzer. Netzer had presumed that Attorney Brinckman was diligently exploring all his leads, verifying witnesses stories, and preparing witnesses for trial--including issuing subpoenas.

But on the Wednesday before the trial which was suppose to start on the following Monday, when Attorney Brinckman started to pressure Netzer to accept a plea bargain, Netzer called around and could not find anyone that knew about the trial. In fact 2 of Netzer's witnesses, John Petry and Gary Macaulay, informed Netzer that they had paid a non-refundable fee just about a week earlier to go on an Alaskan cruise, so they would not be available for trial.

Netzer then called Attorney Brinckman back on that same Wednesday to see if he had acquired the phone records that Netzer thought made a strong case for his defense, but Atorney Brinckman responded by saying -- now more than 2 months after Netzer had requested that Attorney Brinckman subpoena the phone records--that that "was a good idea, so why don't you order them". Of Course, Netzer was concerned that there may not be enough time for U.S. Cellular to fully research his request and have the documentation in time for the trial in less than 3 business days, but Netzer called anyway. When Netzer called he got the bad news that those records are only preserved for a year, so if they would have been ordered when Netzer asked Attorney Brinckman to do so, then they would have been available. However, those vital exculpatory records were now lost.

And, Attorney Brinckman never did file any motions in Netzer's behalf. Ironically Attorney Brinckman agreed with Netzer that the charges were "ridiculous'-to use Attorney Brinckman's own word, yet instead of doing the preparation that Netzer expected Attorney Brinckman to do to get ready for trial Attorney Brinckman was apparently negotiating a plea bargain without the knowledge or consent of Netzer to do so.

At the Motion to Withdraw Plea hearing Netzer presented the court with this litany of things Netzer expected Attorney Brinckman to do to defend him and to ready his case for trial. But the trial court, apparently, failed to see how all of this prejudiced Netzer's case. These discrepancies between Attorney Brinckman's actions or omissions and Netzer's expectations are a modest example of all that went wrong. The list is in fact actually much longer, including more exculpatory evidence which Attorney Brinckman should have discovered but now is lost forever. And Attorney Brickman never even finished fully interviewing Netzer. Yet Netzer believed when he made his case for his motion to withdraw pleas that he had made a strong prima facie case that required the trial court to look at the merits of his argument rather than disregard the claims out of hand. In fact the types of errors and omissions which are undisputedly attributed to Attorney Brinckman, such as the failure to prepare witnesses for trial, etc. are the same as the grounds that supported review of attorney conduct in other Wisconsin cases, including: State v. Bentley, 195 Wis. 2d 580, 536 NW 2d 202 (1995), and State v. Harper, 57 Wis. 2d 543, 205 NW 2d 1 (1973).

In Harper, Id. At 556-557 and at 9 the court adopted Sections 3.2 and 4.1 of the American Bar Association Project On Standards For Criminal Justice and stated that

> "(3.2) failure to interview the client and (4.1) failure to fulfill the duty to investigate can amount to ineffective assistance of counsel and prejudice a client's case."

Attorney Brinckman's errors and omissions especially prejudiced Netzer's case in significant ways as outlined above, specifically with the loss of exculpatory evidence and the deterioration of unprepared witnesses' memories or the unavailability of witnesses.

The test for the requisite prejudice to a defendant's case in order to find inadequate assistance of counsel is simply a "But for" test where it can be shown that "but for the deficient performance of the attorney the defendant had a reasonable probability of not entering the same plea or a different outcome." See State v. Ludwig, 124 Wis. 2d 600, 369 NW 2d 725 (1985). Given the above representations of error and omissions by Attorney Brinckman and the statements alluding to such in Netzer's Motion To Withdraw Pleas and the requisite attendance of Attorney Brinckman at the underlying motion hearing, in accordance with the requirements to explore an application to withdraw a plea as set forth in State v. Machner, 92 Wis. 2d 797, 285 NW 2d 905 (Ct. App. 1979) the trial court should have openned up the hearing and held what has become known in Wisconsin as a Machner hearing. To determine if ineffective assistance of counsel in this case deprived Netzer of his constitutional right to counsel. See Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932).

By deciding not to hold a Machner hearing the trial court also added another issue to consider which is whether or not the trial court abused its discretion. See State v. Reppin, 35 Wis 2d 377, 151 NW 2d 9 (1967) wherein the court adopted the "manifest injustice" test as set fourth in the American Bar Association Project On Minimum Standards For Criminal Justice--Pleas Of Guilty and in part stated that "a court would abuse its discretion if it denied a request to withdraw a plea of guilty when any one of these four grounds of manifest injustice was proved." Id. at 14.

The four grounds of manifest injustice essentially are: (1) ineffective assistance of counsel; (2) plea not entered or ratified by defendant; (3) plea was involuntary; or (4) defendant did not receive the charge or sentence concessions contemplated. Netzer has argued at the motion to withdraw hearing and at every stage of appeal that all of the first three forms of manifest injustice are manifested in this case.

3. THE PLEAS ATTRIBUTED IN THIS CASE TO NETZER ARE CONTRARY TO CONSTITUTIONALLY PROTECTED DUE PROCESS BECAUSE THEY WERE NOT VOLUNTARILY AND KNOWINGLY MADE.

It is well established that constitutionally a plea must be knowingly and voluntarily made to be a valid, enforceable plea, Please see Boykin v. State of Alabama,395 U.S. 238, 89 S. Ct. 1709 (1969).

In the present case Netzer has been vigorously defending/representing himself for more than 8 months. But during the pendency of this case Netzer began to break down emotionally, psychologically, and even mentally, and physically. This was due to an almost insurmountable belief that false charges were being brought against Netzer and no one who mattered in this forum--the court or the prosecutor would listen to what Netzer knew to be true.

Netzer had tried to convey his situation to the court through a lengthy Motion To Dismiss but the court never seemed to read the motion and certainly never heard the motion or even set it for hearing. Next Netzer contacted legal aid/legal services where he had volunteered his summer years ago, but he was not able to find any help there.

So, just before the original trial date in February or March 2001 Netzer spent all day in the La Crosse Public Library and read Final Exit by Derek Humphreys and contemplated suicide as a way to deal with what he saw as an unjust and biased trial. Netzer even called Derek Humphreys to get more input about the process of performing a peaceful suicide from Mr. Humphreys. Certainly Netzer never thought his life would come to this. But, as a last hope Netzer requested a continuance from the court in January of 2001 so that maybe he could find an attorney to represent him so that he could fight this thing after all. Unfortunately, as the trial grew nearer the court, in the person of the Honorable Judge Ramona A. Gonzalez, never responded to Netzer's request for a continuance. So, Netzer bought the supplies he thought he needed for a "Final Exit" style suicide, i.e., a helium tank, etc. and planned to end everything for himself before the trial.

The weekend before the trial Netzer went on one last nostalgic drive before his planned suicide and eventually parked his vehicle to rest and was arrested for being too close to the city where the alleged victim, DN, lived even though Netzer was at least miles away from DN or her residence. But after getting beyond that Netzer still had not got beyond his tremendous distress over the pending trial so he went through with his suicide attempt. Netzer sat in his garage with the car running, with the helium canister next to him and he wrote his final good-byes to all his friends and family. Netzer had already filed a final will with the Register in Probate and had divided up whatever he had among his friends and family, including DN.

Netzer has always been not-too-mechanical and not-too-brave perhaps as well, so as he put a bag over his head and began ingesting the helium as well as the car exhaust, he couldn't take it.

According to Final Exit he was suppose to take sleeping pills to ease the process, but Netzer never believed in drugs so he wasn't going to go out that way. The result is that the suicide failed.

Now, with the suicide failure and the State receiving a continuance--when Netzer could not --Netzer saw the writing on the wall that he had to follow his belief in his innocence and fight the charges against him. But from his recent history Netzer learned that he could no longer depend upon himself to do what needed to be done. So he accelerated his efforts to retain an attorney to take the case to trial.

Netzer made a diligent effort, investing time probably during ever business day to hire an attorney. He talked to defense attorney specialists that handled some of the cases that no one else would ever want and they still turned Netzer down. More than once Netzer found an attorney he could be comfortable with, first there was Ellen Thorn, then John Matousek, then Margarita Van Nuland. Attorney John Matousek even did some work on the case and copied and reviewed the entire thick court file. Unfortunately everyone ultimately gave Netzer the same answer -- that they could not handle his case because the judge just did not schedule enough lead time to fully prepare.

The rest of this story is well documented in the pages leading up to this segment. Netzer believes that he had an attorney forced upon him that he did not want, the trial was fast-tracked so that it was difficult for any attorney to do all the preparation that was necessary. Unfortunately, Netzer's attorney, Attorney John Brinckman, seemed not to care about Netzer's case.

Attorney Brinckman had a high profile defendant in a gang killing that he was defending at the same time as Netzer and Attorney Brinckman never got around to even inquire of Netzer about all the facts in the case let alone talk to Netzer's witnesses, subpoena phone records Netzer knew would be exculpatory, or do any additional discovery or move the court.

The key to how all of this adds up to the pleas attributed to Netzer being involuntary and unknowing are as follows: (1) the massive lack of preparation of Attorney Brinckman hit Netzer like a brick because Attorney Brinckman was advised from day one that Netzer wanted to take this matter to trial and that Netzer believed in his innocence. Whenever Netzer talked to Attorney Brinckman it sounded to Netzer as if Attorney Brinckman agreed with Netzer that many of the charges were sadly comical given the seriousness of the charges but being mindful that the facts did not support the charges; (2) Netzer had no contingency plan to Attorney Brinckman, he had already spent $5,000.00 on Attorney Brinckman and Atorney Brinckman said he would go to trial. But Attorney Brinckman was not ready and behind Netzer's back he was plea bargaining; (3) As stated earlier, Attorney Brinckman's errors and omissions directly were responsible for lost exculpatory phone records, unavailable witnesses, unprepared witnesses, etc. as well as an unprepared attoney because Attorney Brinckman had still not heard all of Netzer's side of the story. Amazingly, no one seemed to know for sure what charges would ultimately apply in the plea bargain -- not even Assistant D.A. Clark or Attorney Brinckman--and no one had an explanation for what an Alford Plea was. The understanding that Attorney Brinckman conveyed that stuck with Netzer was that such a plea is a protestation of innocence.

Apparently the trial court could still convict on such a plea but there must be a factual basis and this was something that Netzer did not believe existed and thought that with what was on the table that a fact basis could not be found.

Taking in the totality of circumstances, including Netzer's mental and psychological health and the dire problems and ethical issues with the assistance of counsel, together with Netzer's belief that there was a bias in the court and the prosecutor that should have been dealt with by them or by Attorney Brinckman, then there is no knowing and voluntary plea in this case. Along those lines please remember that Netzer actually never did enter a plea himself in this case--Attorney Brinckman was asked to enter the pleas by the court despite the fact that Netzer was sitting right beside Attorney Brinckman.

Evidence of the lack of voluntariness of the plea in the instant case can be demonstrated by the fact that in April of 2001 Netzer was offered an unsolicited plea bargain by the District Attorney's Office of 3 years of probation and Netzer, without hesitation, declined the offer. This is virtually identical to the offer that Attorney Brinckman negotiated, without Netzer's knowledge or approval, some 4 months later after Netzer had invested $5,000.00 in Attorney Brinckman with the understanding that Attorney Brinckman was going to be prepared and was going to take the matter all the way through the conclusion of a trial. It defies logic to go through 4 more months of a criminal process and all that that entails and spend what amounted to a large sum of money for Netzer in order to end up with a plea that had been long on the table.

Netzer's state of mind, and his mental and psychological incapacity also contributed to his inability to make a knowing and voluntary plea at the time of the plea hearing.

At the plea hearing Netzer expected that at the plea hearing the judge would not allow a plea given Netzer's recent history of attempted suicide and his then-current status as a psychologist's patient for depression. But, the trial court being made aware of these circumstances, did not even ask for a pre-sentence psychiatric evaluation of Netzer.

Finally, Netzer did not have, apparently, a correct understanding of what an Alford plea was. In fact not even Netzer's attorney or opposing counsel provided a definition or explanation of what was meant by an Alford plea. From the brief explanation Attorney Brinckman offered Netzer of the meaning of an Alford plea, after negotiating the plea without Netzer's knowledge or consent, it was presented to Netzer simply that Netzer could continue to profess his innocence and, because Attorney Brinckman agreed that many of the charges were filler and ridiculous, the State could not still get an Alford plea approved if it was not able to provide a verifiable fact basis for the charges--which do not exist. Netzer was left with the picture that it was unlikely an Alford plea could be accepted by the court in this case. Attorney Brinckman's brief comments about an Alford plea also made it sound as if an Alford plea was nothing like a guilty plea and, in the event that the court disagreed with Netzer's belief and still found a sufficient fact basis for an Alford plea, an Alford plea, in Netzer's mind, would not be like reading in the newspaper that Netzer was found "guilty" of X or Y but more like "Netzer had an Alford plea entered against him and he still professes his innocence and the prosecution never made a case against Netzer".

CONCLUSION

For the reasons stated above it is respectfully prayed for that the writ of certiorari should be granted.

Respectfully submitted, October 9, 2004

x Randy J. Netzer

Randy J. Netzer, Petitioner Pro Se

APPENDIX A

DECISION APPEALED FROM
OF THE WISCONSIN COURT OF APPEALS
DISTRICT IV

COURT OF APPEALS
DECISION
DATED AND FILED
December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE
This opinion is subject to further editing. If published, the official Version will appear in the bound volume of the Official Reports.

A party may file with The Supreme Court a Petition to review an Adverse decision by the Court of Appeals. See WIS. STAT. Sec. 808.10 and RULE 809.62.

Appeal No. 03-0249

Cir.Ct. Nos.01CM0301
00CM1490

STATE OF WISCON

COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

RANDY J. NETZER,

DEFENDANT-APPELLANT

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. Affirmed.

1. DEININGER, P.J.[1] Randy Netzer appeals an order denying his motion to withdraw his pleas to misdemeanor stalking and violating a harassment restraining order. He claims his pleas were invalid because (1) he did not personally enter them, (2) his counsel was ineffective, and (3) the trial court failed to determine that there was "strong evidence of guilt" to support his *Alford*[2] pleas. He also claims the trial court erroneously exercised its discretion, and that the prosecutor was based and should have requested a special prosecutor. We conclude that most of Netzer's claims are barred under *State v. Escalona-Naranjo,* 185 Wis. 2d 168, 517 NW 2d 157 (1994), and any that are not lack merit. We therefore affirm the appealed order.

BACKGROUND

2. The State charged Netzer with stalking, harassment and several counts of violating a harassment restraining order, and later with bail jumping. Approximately eight months after his initial appearance, Netzer, who is himself an attorney, retained counsel to represent him. Two months after obtaining counsel, Netzer entered *Alford* pleas to stalking and one count of violating a restraining order. Al other charges were dismissed.

1 This appeal is decided by one judge pursuant to WIS. STATS. Sec. 752.31(2)(f) (2001-2002). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

2 N*orth Carolina v. Alford,* 400 U.S. 25 (1970). An *Alford* plea "is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime." *State v. Garcia,* 192 Wis. 2d 845, 856, 532 NW 2d 111 (1995). In order to accept an *Alford* plea, a court must ensure that there is a showing of "strong proof of guilt" by the State that the defendant committed the crime to which he or she pled. *Id.* at 857-58.

The trial court sentenced Netzer to three years of probation with three weekends in jail, counseling, and certain contact restrictions as conditions.

3. At Netzer's request, his trial counsel filed on his behalf a Notice of Intent to Pursue Postconviction Relief. Netzer, proceeding pro se, then filed a motion to withdraw his pleas. In an attached affidavit, Netzer advanced three reasons why he should be permitted to withdraw his pleas: his attorney had not contacted witnesses nor filed any motions; "prosecutorial abuse of discretion"; and the court's failure to ascertain "strong proof of guilt" when accepting his *Alford* pleas. The trial court heard argument on the motion and denied it without taking evidence, concluding that the motion contained only conclusory allegations and provided no factual basis to support Netzer's claims. Netzer did not appeal. Instead, some eight months later, Netzer filed another motion to withdraw his pleas.

4. Netzer's second post conviction plea-withdrawal motion cited the following grounds: "prosecutorial abuse of power and overstepping"; "abuse of discretion of court," an element of which was the court's failure to ascertain strong proof of his guilt; "inadequate counsel," citing counsel's failure to file motions, contact witnesses or otherwise prepare for a trial; and "lack of authorized plea" because his attorney had entered the pleas, allegedly without his authority. The trial court heard argument on Netzer's second motion and denied it without an evidentiary hearing. Netzer filed a notice of appeal but we dismissed the attempted appeal for lack of jurisdiction because no written order had been entered denying Netzer's second plea withdrawal motion. In our order, we noted that Netzer's "latest motion cannot be a direct appeal of the judgment of conviction but rather it is a post conviction motion under WIS. STAT. Sec. 974.06."

5. Netzer then procured an order from the trial court denying his second plea withdrawal motion "without further hearing" because said *Alford* Plea was not involuntary as it was freely, intelligently and voluntarily made," and Netzer's "claim of ineffective assistance of counsel has not been sufficiently supported in the documentation presented." Netzer appeals this order.

ANALYSIS

6. As the background summary indicates, the first three grounds Netzer raised in his second post conviction motion to withdraw his pleas were previously raised in his first post conviction motion. Netzer is not entitled to raise in a post conviction motion under WIS. STAT. Sec. 974.06 grounds that were finally adjudicated in a prior post conviction motion, including a motion brought under WIS. STAT. Sec. 974.02 and WIS. STAT. RULE 809.30. *Escalona-Naranjo,* 185 Wis. 2d at 181; *State v. Braun,* 185 Wis. 2d 152, 167, 516 NW 2d 740 (1994); WIS. STAT. Sec. 974.06(4).

7. As the supreme court explained in *Escalona,* "[w]e need finality in our litigation." *escalona-naranjo,* 185 Wis. 2d at 185. The court's holding interpreting WIS. STAT. Sec. 974.06(4) precludes Netzer from employing a motion under Sec. 974.06 to renew the claims decided adversely to him in his prior WIS. STAT. Sec. 974.02 motion. If Netzer believed that his original post conviction motion to withdraw his pleas was wrongly denied, his remedy was to appeal that denial--not to wait eight months and re-file a nearly identical motion. As we have noted, Netzer did not pursue a "direct" appeal under WIS. STAT. Sec. 809.30 after his first post conviction motion was denied. Thus, the grounds raised in Netzer's original post conviction motion (ineffective assistance of

counsel, prosecutorial bias, and the court's failure to ascetain "strong proof of guilt") became "finally adjudicated" within the meaning of Sec. 974.06(4) when the timefor appealing the trial court's order denying the original moton expired.

8. Accordingly, we conclude that Netzer's present clains regarding the prosecutor's alleged bias 3, the inefectiveness of his counsel for not filing motions or conacting witnesses, and the court's failure to ascertain strong proof of his guilt before accepting his *Alford* pleas, are not properly before us. It might also be argued that Netzer's remaining claim or claims are similarly precluded under *Escalona* on account of his failure to show "sufficient reaon" for not raising them in his original motion. *See* WIS. STAT. Sec. 974.06(4); *Escalona-Naranjo,* 185 Wis. 2d at 186 We decline for two reasons, however, to apply *Escalona* to the one claim in Netzer's present motion that was clearly notraised in his first motion: that he should be allowed to withdraw his pleas because it was his counsel and not he that entred them. First, the *Escalona* bar against successive post conviction motions was not raised in the trial court and, had it ben, Netzer might have been able to establish sufficient reaon for omitting his claim from his original motion. See *Stae v. Avery,* 213 Wis. 2d 228, 247-48, 570 NW 2d 573 (Ct App. 1997).

3 It appears that the victim of Netzer's stalking and restraining orde violation was a La Crosse County employee who worked in the courthouse.

Furthermore, it appears that Netzer may not have had a transcript of the plea hearing at the time he filed his first motion. [4]

9. Even though we accept it as properly before us, we reject Netzer's claim for relief from his pleas on the ground that his attorney responded on Netzer's behalf to the court's questions, "what is your plea?" Prior to these questions and counsel's responses, the court had an extensive colloquy with Netzer personally, and he had signed both a "Plea Questionnaire/Waiver of Rights" form and a "Statement of Negotiated Plea," all of which plainly establish Netzer's intention to enter *Alford* pleas to the two offenses. For example, the court's personal colloquy included the following question to Netzer, "The issue is, Mr. Netzer, you wish to plead--you wish to enter an *Alford* plea to both counts?" to which Netzer replied, unequivocally, "Yes, Your Honor."

[4] We have no similar reservations about applying the "finally adjudicated" prong of *Escalona*to the issues raised and disposed of in Netzer's first motion. The record clearly establishes the duplication of issues in Netzer's two post conviction motions and the court's denial of his first motion, both orally and by written order. These matters are unaffected by the State's failure to argue the *Escalona* bar during the trial court proceedings on Netzer's second motion. We also do not view the lack of a plea hearing transcript at the time Netzer filed his first motion as a sufficient reason for any inadequacies in the manner the duplicated issues were first raised. Netzer could have obtained the transcript prior to filing his first post conviction motion if he deemed it necessary for the claims he was making. See WIS. STAT. Sec. 809.30(2)©2, (f),(g), and (h). He chose, perhaps unwisely, not to do so. He also could have requested the transcript after his first motion was denied and either moved the court to reconsider its denial or appealed the denial to this court. Finally, because Netzer represented himself at the time, he cannot cite ineffective assistance of postconviction counsel as grounds for avoiding the *Escalona* bar on the adjudicated issues.

10. We conclude that the present facts are governed by the supreme court's holding in *State v. Burns,* 226 Wis. 2d 762, 594 NW 2d 799 (1999), that even though a defendant "did not expressly and personally articulate a plea...on the record in open court...the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest." *Id.* at 764. Just as in *Burns*, it is clear from the present record, "that is, from the written plea questionnaire and waiver of rights form and the plea colloquy, that the defendant intended to plead no contest [via an *Alford* plea] to the charged offense[s]." *Id.* at 769-70.

11. Even if we had not concluded that most of the grounds for withdrawing his pleas that Netzer asserted in his present motion are barred under the holding in *Escalona,* and to the extent that he could argue that some portions of his present claims were not subsumed within the previously adjudicated claims, we note that we would nonetheless affirm the trial court's denial of Netzer's second motion. Neither Netzer's claim that the prosecutor was biased and should have requested a special prosecutor, nor his claim that the trial court erroneously exercised its discretion in certain regards, would constitute grounds under WIS. STAT. Sec. 974.06 for Netzer to withdraw his plea. Only constitutional and jurisdictional issues may be addressed via a motion under Sec. 974.06. See *State v. Minniecheske,* 223 Wis. 2d 493, 498, 590 NW 2d 17 (Ct. App. 1998). Not only are the "bias and abuse" claims not of constitutional or jurisdictional dimension, neither do they speak to the issue of whether Netzer's pleas were freely and knowingly entered or, for some other reason, the product of some "manifest injustice."

12. Netzer's assertion of ineffective assistance of counsel, because it raises a Sixth Amendment claim, is a proper subject of a motion under WIS. STAT. Sec. 974.06, and if the ineffectiveness of his counsel resulted in Netzer's entry of pleas other than not guilty, a manifest injustice would have occurred. See *State v. Bentley,* 201 Wis. 2d 303, 311, 548 NW 2d 50 (1996). As the trial court noted, however, Netzer failed to include in his moving papers any explanation of why or how his counsel's alleged shortcomings prompted him to enter pleas that he did. Accordingly, he was not entitled to an evidentiary hearing on these allegations and the trial court did not err in denying his motion without a hearing. See *Id.* at 316-17, 319.

13. Finally, as to Netzer's claim that there was not "strong proof" of his guilt to support his *Alford* pleas, we note that the plea questionnaire Netzer signed includes the following statement: I understand that if the judge accepts my plea, the judge will find me guilty of the crime[s] to which I am pleading based upon the facts in the criminal complaint..." We have reviewed the criminal complaint and concluded it alleges sufficient facts that, if established at trial, would constitute grounds for finding Netzer guilty of stalking and violating a harassment restraining order. Netzer's arguments in support of his claim that a sufficient factual basis for his pleas was not demonstrated confuses the State's ability to prove what it asserted in its complaint, which is what Netzer disputes, with the question of whether the factual allegations of the complaint encompass the elements of the offenses to which he pled.

The entry and acceptance of his pleas precludes him from now denying the allegations. See *State v. Merryfield,* 229 Wis. 2d 52, 60-62, 598 NW 2d 251 (1999) (noting that the purpose of requiring a factual basis inquiry where a plea of guilty or no contest is tendered "is not to resolve factual disputes about what did or did not happen at or before the time of the alleged offense--the function of a trial, which a defendant who pleads other than not guilty expressly waives").

CONCLUSION

14. For the reasons discussed above, we affirm the appealed order.

By the Court.--Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

APPENDIX B

TRIAL COURT DECISION PROCESS

1. Order Deny Motion To Withdraw Plea	12a-13a
2. Affidavit And Memorandum In Support Of Motion To Withdraw Plea	14a-26a
3. Plea Hearing of August 28, 2001	27a-38a

STATE OF WIS. CIR. CT BR I LA CROSSE CO.

STATE OF WIS.,
Plaintiff
Vs.

RANDY J. NETZER
2522 South 13th Pl.
La Crosse, WI 54601
Defendant

ORDER DENYING MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT

Case No. 00CM1490 and 01CM301

Filed Jan 6 2003
Pamela Radtke
Clerk of Courts

The defendant has filed a "Motion To Withdraw Plea and Vacate Judgment" with respect to an Alford Plea made by his attorney in the above-captioned case on the grounds of A. prosecutorial abuse of power and overstepping; B. Abuse of discretion of the court; C. Inadequate counsel; and D. Lack of authorized plea. At hearing based on said motion this court made the following findings, to wit: A. that the prosecutorial abuse of discretion and overstepping alleged by the defendant does not rise to a level of manifest injustice that would support a motion to withdraw said Alford Plea; B. there was no abuse of discretion by the court in the instant case; and C. the defendant's motion does not provide sufficient documentation to support a claim of ineffective assistance of counsel.

WHEREFORE, based upon the afore-mentioned findings,

IT IS HEREBY ORDERED that the motion is denied without further hearing as the court hereby rules and so orders that said Alford Plea was not involuntary as it was freely, intelligently and voluntarily made; Furthermore, the defendant's claim of ineffective assistance of counsel has not been sufficiently supported in the documentation presented.

Dated this 3rd day of January, 2003 at La Crosse, Wisconsin.

BY THE COURT:

S/Ramona A. Gonzalez
Circuit Ct. Judge, Br. I

STATE OF WIS CIR CT BR I LACROSSE CO

STATE OF WIS. Plaintiff, Vs. RANDY J. NETZER 2522 So. 13th Pl. La Crosse, WI 54601	AFFIDAVIT AND MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT Case No. 00CM1490 and 01CM0301

I, Randy J. Netzer, being first duly sworn, on oath hereby depose and state as follows:

1. I am the Defendant in the above-captioned cases;

2. I was represented by Attorney John Brinckman when [he] entered pleas [on my behalf] to a Count 1 of stalking in violation of [Sec.] 940.32, Wis. Stats., and Count 2 of violation of a harassment injunction in violation of [Sec.] 813.125, Wis. Stats., on August 28, 2001 before the Honorable Judge Ramona Gonzalez in La Crosse County Circuit Court (A copy of the Transcripts is attached hereto and incorporated herein by this reference [NOTE: Said Transcripts consist of 75 pages and are not included as part of this Petition for Writ of Certiorari to the United States Supreme Court]);

3. Within 10 days of said plea I wrote to Attorney Brinckman and informed him that I would be filing a Motion to Withdraw Plea. It is my understanding that Attorney Brinckman, in response to said letter to him, filed a Notice of Intent to Pursue Postconviction Relief with La Crosse County Circuit Court on my behalf.

It is also my understanding from subsequent correspondence with Attorney Brinckman that he feels his responsibilities in these cases is ended;

4. I am making this Affidavit/Memorandum in support of my Motion to Withdraw Plea and Vacate Judgment and to assist the Court in assessing said Motion;

MEMORANDUM

5. There are 4 separate reasons or categories of reasons herein to justify this Motion, each of which I hereby argue is sufficient justification in and of itself for the Court to find in favor of said Motion. These reasons are A. Prosecutorial Abuse of Power and Overstepping ; B. Abuse of Discretion of the Court; C. Ineffective Assistance of Counsel; and D. Unauthorized Entry/Acceptance of Plea, to wit:

A. PROSECUTORIAL ABUSE OF POWER AND OVERSTEPPING

(1) OVERSTEPPING ENFORCEMENT/FAILURE OF NOTICE: The Prosecutor charged the Defendant with numerous violations of an injunction that the Prosecutor alleged to have occurred at times prior to the Defendant being served with said injunction. More specifically, in Case No. 00-CM-1490 the Prosecutor charged that the Defendant violated a harassment injunction at least 5 times between October 2, 2000 and October 11, 2000 while the Defendant did not [know of or] receive the injunction until after October 11, 2000 and the Prosecutor was aware of this fact and does not deny this fact. This procedure by the Prosecutor blatantly violates the principles of the U.S. and Wisconsin Constitutions and Sec. 813.125, Wis. Stats., [requiring due process/notice].

(2) BIAS: In the Criminal Complaint in the above-captioned case, Case No. 00-CM-1490, in particular Counts 2 through 6, the prosecutor alleges multiple harassment in violation of Se. 813.125, Wis. Stats., which show a bias on the part of the Prosecutor as the [specific] Prosecutor [in this case] knew or with due diligence would have known that the Defendant routinely used La Crosse County offices for various [legitimate] reasons dating back at least to 1984 and the Prosecutor knew, or upon reasonable and fair investigation thereof would have known, that the Defendant had a legitimate reason for his whereabouts. Similarly, the Prosecutor's bias is on display, for instance when at the afore-mentioned plea hearing on August 28, 2001 the Prosecutor stated "There have been things that have been happening during the pendency of the case that we could not really pin on him (referring to the Defendant). But when a car was parked outside her house she'd get hang up calls all night long. There has been suspicious stuff that he has done." (please see 8-28-01 Transcripts p. 33-34.) Obviously the Prosecutor's bias is so deep-seeded that the Prosecutor is willing to use innuendo and false or unproven circumstances.. That could have been easily investigated to exonerate the Defendant to create the Prosecutor's image oof the Defendant.

(3) LACK OF SUFFICIENCY OF CHARGES: Also, bias on the part of the Prosecutor is shown by the fact that the Prosecutor's Criminal Complaint lacks sufficiency of evidence because the Prosecutor never alleges in either of the above-captioned cases that the Defendant was [] in the same place as the alleged victim.

(4) FALSIFICATION OF EVIDENCE: Upon information and belief, in order to support the Prosecutor's case, the Prosecutor has padded the Prosecution file and the Court's file by writing a letter or letters purporting to be written by the alleged victim and then filing same in said files. Apparently the Prosecutor also threatened the Defendant's Attorney that the Prosecutor would assert that the Defendant's home décor imitates the alleged victims décor while the Defendant has had much of his furnishings for 3 years or more before he knew the alleged victim.

(5) FAILURE TO PROVIDE EXCULPATORY EVIDENCE: If the Prosecutor is aware of hang up phone calls and cars parked in front of someplace as the Prosecutor alluded to at pages 33 and 34 of the 8-28-01 plea transcripts and referred to herein above, then it would stand to reason that the Prosecutor would have records of these vehicles and tracer information about the phone calls that would exonerate the Defendant and the Prosecutor has never come forward with these items.

(6) CONFLICT OF INTEREST: There is at least certainly a strong appearance of bias on the part of the Prosecutor as well [,] as the alleged victim is an employee of the Prosecutor's office and has been a La Crosse County employee during the entire pendency of this matter. Most Prosecutor's in this situation would seemingly defer to a Special Prosecutor. {Sec. 978.045, Wis. Stats.]

B. ABUSE OF DISCRETION OF COURT

(1) FAILURE TO ADMONISH PROSECUTOR FOR FALSE OR UNSUPPORTED STATEMENTS: As alluded to above, the Prosecutor made statements on the record in open court, clearly for prejudicial value, which the Prosecutor admitted to being unsupported statements, yet the Court never admonished the Prosecutor for this conduct

(referring again, in particular to p. 33 and 34 of 8-28-01 plea hearing transcripts). "Other acts" references by the Prosecutor were also unsubstantiated. Given that the Court declined to point to any specific act or acts of the Defendant in making a finding of guilt and imposing sentence, it is especially a concern that the Court may be using some of these untrue, unsubstantiated and unsupportable remarks as a significant ingredient in the Court's decision-making.

(2) BIAS OF THE COURT: A bias by the Court against the Defendant is evident through the Court's own words at the plea hearing as the Court summed up best its readiness to prejudge the Defendant by stating: "And the reason I'm looking the way I'm looking is because its almost déjà vu in these cases. You have someone who doesn't understand when another human being says the relationship is over and quite frankly those other cases have not gone well." (please see 8-28-01 transcripts at p. 25) Then again the Court states: "Déjà vu for me all over again." (please see 8-28-01 transcripts at p. 35-36) And the Court followed that statement by saying: "I hope Mr. Netzer that working with your therapist … that you come out on the other end of the tunnel, but I'm going to be very frank with you, if you do you will be my first success story on a stalking case." (please see 8-28-01 transcripts at p. 61)

Another example of the Court's bias appears on the record when the Court discusses at said plea hearing the propensity for stalkers to structure their lives around the alleged victim. (please see 8-28-01 transcripts at p. 27) The lament has merit, but a fair and unbias Court would not look at all situations as being the same or ignore facts, and the Court has personal knowledge that this Defendant was regularly using La Crosse County offices years before the alleged victim moved to this area.

If not demonstrating a bias against the Defendant, the Court at a minimum also demonstrated no favoritism to the Defendant when the Court refused to grant a continuance requested by the defense before sentencing. The Defendant had always intended to take this matter to trial and the Court in all likelihood, based upon prior court appearances and the fact that the Defendant had requested leave of the Court to find assistance of counsel, expected the Defendant to proceed to trial , but the only reason this case did not go to trial was because the Defendant did not believe his attorney was prepared. So, granting a continuance would have allowed the Defendant the chance to prepare with his attorney. But, without the continuance the Prosecutor was able to seize the opportunity to interject untrue and unsupportable statements that may have impacted the Court.

Finally, one of the most egregious examples of the Court's bias, or at a minimum an abuse of discretion by the Court in the instant case, is hat when the Defendant asked the Court for a reasonable continuance in order to retain an attorney the Court initially granted the Defendant only 2 months to find an attorney and have that attorney prepared to go to trial. The time provided by the Court in this instance proved to be insufficient as the Defendant tirelessly contacted attorneys to seek representation but each attorney that the Defendant spoke to indicated that there was insufficient time to prepare. The list of attorneys that this Defendant spoke directly to and desired to retain who could not take on this case because they told the Defendant that the preparation time was insufficient included: John Matousek, Ellen Thorn, Margarita Van Nuland, and Michael Devanie. The Defendant also spoke with Ken Peterson, Attorney Huesmann, Tom Guth, James Thibodeaux, and Cheryl Gill, among others. When the Defendant reorted to the Court that

a dligent effort was being made to retain an attorney, the Cort only granted approximately 12 business hours to find an ttorney between a morning court appearance on a Thrsday and 3 P.M. the next day. With all due respect to Attrney Brinckman, this Defendant was aware of Attorney Brickman's law practice but had chosen instead to seek a diffrent attorney; However, it was Attorney Brinckman who initally contacted the Defendant and without any other optons and with the Court-imposed deadline the Defendant feltlimited to Attorney Brinckman. This fact can even be coroborated by the Court's own staff who witnessed the Defndant in the Court's office at the 3 P.M. deadline still talkng to Attorney Tim Guth, who the Defendant had tried to ontact all day, and because Attorney Guth did not have the ime to review the case this Defendant submitted to the Cort the name of Attorney Brinckman as defense attorney. Essntially, due to these restrictions imposed by the Court, thisDefendant was denied the very basic constitutional right to ounsel.

(3) LACK OF FACTUAL BASIS FINDING BY THE COURT SUFFICIENT TO FIND GUILT BASED UPON AN ALFORD PLEA. From the very beginning when thisDefendant was first charged with the crimes alleged herein this Defendant has protested his innocence.

In Alford plea cases in Wisconsin case law has made it clear that a trial court must find a factual basis for each and evey element of a crime in order to and before making a findng of guilt as to that crime. This judicial requirement wasclearly stated in State v. Smith , 202 Wis. 2d 21 (1996), as fllows:

> Before accepting a guilty plea or a plea of no-contest, the trial court must ascertain "that the defendant in fact committed the crime charged." Wis. Stat. Section 971.08(1)(b). Although Alford pleas are not mentioned in the statute, this court has specifically made the procedural safeguards of Wis. Stat. Section 971.08 applicable to such pleas. Garcia, 192 Wis. 2d 856, 860.
>
> Subsection (1)(b) requires a court to establish a sufficient factual basis that the defendant committed the crime to which he or she is pleading. See State v. Bangert, 131 Wis. 2d 246, 262, 389 N. W. 2d 12 (1986). In an Alford plea, a trial court is required to find a sufficient factual basis, i.e., strong evidence of guilt, in order to conclude that the Defendant committed the crime to which he or she is entering the plea.

The court in State v. Smith went on to emphatically underscore the high burden placed on a trial court to establish a factual basis for all elements of a crime in an Alford plea case before making a finding of guilt by stating:

> The requirement of a higher level of proof in an Alford plea is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's "protestations" of innocence. Although strong proof of guilt is less than proof beyond a reasonable doubt, State v. Spears, 147 Wis. 2d 429, 435, 433 N.W. 2d 595 (Ct. App. 1988), it is clearly greater than what is needed to meet the factual basis requirement under a guilty plea. Id. at p.27.

In the instant case the Court entered 2 findings of guilt for 2 crimes before any offers of proof were even presented to the Court. Specifically, without establishing any factual basis the Court found the Defendant guilty of Count 1 of stalking in violation of Sec. 940.32(2), Wis. Stats. (please see 8-28-01 Transcripts p. 10) and Count 2 of violating a harassment injunction contra to Sec. 813.125, Wis. Stats. (please see 8-28-01 Transcripts p. 12). Then, without reciting any specific factual basis, the Court makes the following conclusory announcement (please see 8-28-01 Transcripts p. 12), to wit:

> Court accepts the Alford pleas and upon these pleas does find that the pleas are freely, intelligently and voluntarily made. There is sufficient factual basis with regard to both Count 1 and Count 2 I accept those pleas and hereby enter convictions against the defendant on Count 1 stalking and Count 2 violation of the injunction.

For the Court to find guilt in Count 1 stalking, Wisconsin law would require the Court to find a factual basis and delineate same that supported that Subsections 940.32(2)(a), 940.32(2)(b), and 940.32(c), Wis. Stats., all existed. However, this defendant has steadfastly denied any such course of conduct as outlined in Sec. 940.32(2)(a). And this defendant has also steadfastly stated that he did not have any knowledge of causing the alleged victim or anyone else any fear of any kind because the defendant does not hold that intent for anyone and certainly has never spoken any threatening words or harmed the alleged victim, contrary to what would be required for a finding of Sec. 940.32(2)(b).

For the Court to find guilt in violation of a harassment injunction per Sec. 8i13.125, Wis. Stats. the Court would have to find and establish a factual basis and delineate that (1) the Defendant had notice of the injunction and (2) that the Defendant intentionally violated the injunction. Item (1) cannot be proven because notice d[oes] not exist, so the rule announced in State v. Smith, supra should apply to disallow the Alford plea. There is also no factual basis for Count 2 delineated or established by the Court on the record at the 8-28-01 plea hearing.

With both Counts 1 and 2 this Defendant has repeatedly represented to the Court, to the Prosecutor, and to Attorney Brinckman that the Defendant has had no intent to have any contact with the alleged victim since August 2000. This point is particularly frustrating because despite this continual recitation in plain words, at the plea hearing the Prosecutor and Attorney Brinckman are saying that the Defendant had no intent to harm the alleged victim, while the Defendant has been saying that he did not want to be near the alleged victim. Of course the Defendant wishes the alleged victim no harm, but he also has not wanted her involved in his life or to know anything about her life since well before the criminal charges in this case were alleged to have occurred.

C. INADEQUATE COUNSEL. There are a number of instances that can be pointed out in order to demonstrate the fact that the Defendant received inadequate counsel from Attorney Brinckman in the instant case. In many ways the performance of counsel is partly to be blamed on the lack of sufficient time counsel had to prepare for this case as alluded to earlier. The Defendant alluded to this fact at the plea hearing when the Court asked about adequacy of counsel and

the Defendant avoided the question twice so as not to offend his attorney, Attorney John Brinckman or the Court, and then stated that Attorney Brinckman "did what he could in the time that was provided." But this was also meant to be a statement of the Defendant's concern that Attorney Brinckman, as a busy attorney, did not devote all of the time that was needed for this case. One example of this is that the Defendant gave Attorney case law relevant to this matter which Attorney Brinckman failed to use at an earlier hearing and at the plea hearing, when Attorney Brinckman did rely on the same case, he still did not use the name of the case.

During the plea hearing itself this Defendant did address the Court and state that he believed that Attorney Brinckman should have filed a motion to dismiss or motions in limine, that the Defendant did not completely have an opportunity to discuss his defense with Attorney Brinckman, that the Defendant provided a list of witnesses to Attorney Brinckman but most had not been contacted and none were prepared for trial or subpoenaed, and that the lack of subpoenaing witnesses meant that at least 2 witnesses would not have been present at trial. These types of omissions by a defense attorney are exactly the types of omissions pointed to in State v. Harper, 57 Wis. 2d 543, 556-557, 205 N.W. 2d 1, 9 (1973) wherein the court [the Wisconsin Supreme Court] adopted Sections 3.2 and 4.1 of the American Bar Association Project on standards for Criminal Justice and stated essentially that failure to interview the client (3.2) and failure to fulfill the duty to investigate (4.1) can amount to ineffective counsel and prejudice a client's case.

In particular the representation received prejudiced the Defendant's case because, the whole purpose of asking the Court for time to seek an attorney and the motions filed

by this Defendant were for the purpose of this Defendant taking this matter to trial. This Defendant spent $5,000.00 to be represented at trial and Attorney Brinckman knew this. It is ridiculous for anyone to view this matter and think that someone would pay $5,000.00 and settle for a plea bargain after Scott Horne [the District Attorney] from the Prosecutor's office, had offered the Defendant the same 3 years of probation months earlier, before the loss of a great deal of time and before going through the additional stress this has placed on the Defendant and before spending that kind of money.

The fact that this Court has squeezed this case so as to prevent the Defendant from retaining another attorney [of his own clear choice] and from providing enough time for Attorney Brinckman, perhaps, to follow through on the motions and the investigation that this Defendant had requested, is at a level which has been recognized by the Wisconsin Supreme Court as being sufficient to contribut to inadequacy of counsel. The [Wisconsin Supreme] Court came to this conclusion in State v. Reppin, 35 Wis. 2d 377, 151 N.W. 2d 9 (1967) where it stated:

> Ineffective assistance of counsel may also be caused by external circumstances over which counsel has no control, such as not being given time to prepare a defense ... or counsel's lack of loyalty, good faith or zeal.
>
> Id. at p. 15.

D. LACK OF AUTHORIZED PLEA.

The pleas in thi case were entered by Attorney Brinckman (see p. 10 for Count 1 and p. 12 for Count 2 of 8-28-01 Transcripts). I [the Defendant] did not authorize Attorney Brinckman to make these pleas for me and the Court did not ask me for my plea when each plea was entered. Even the plea bargain under which these pleas were based was involuntarily made as I was aware that my attorney was unprepared for trial 4 businesss days before trial and would not be able to provide a defense because he had not interviewed me or all of the witnesses and some of the witnesses would be unavailable because they were not subpoenaed such as John Petry, who would have testified that he knew me for more than 20 years and he lived in West Salem and we did things together regularly in West Salem, and John Petry, as a for instance would not have been available because he had just the week before trial made arrangements to go to Alaska during a period of time that included the scheduled trial date.

WHEREFORE, this Defendant respectfully requests this Court to withdraw the Alford pleas in the above-captioned case, thereby vacating judgment, and setting this matter for further proceedings or dismissing same.

Respectfully submitted this 5th day of August , 2002.

x_____ss/Randy J. Netzer
Randy J. Netzer, Defendant

Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601
608-792-8811

STATE OF WISCONSIN	CIRCUIT COURT	LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.
01-CM-301
00-CM-1490

RANDY NETZER,

Defendant.

August 28, 2001

HONORABLE RAMONA A. GONZALEZ, BRANCH 1

[Plea Hearing]

APPEARANCES

LORALEE CLARK, assistant District Attorney, appeared on behalf of the state.

JOHN BRINCKMAN, Esq., appeared on behalf of the Defendant.

DEFENDANT APPEARED IN PERSON.

(Transcript of proceedings.)

THE COURT: 2000-CM-1490, 2001-CM-301. State versus Randy Netzer. Appearances please.

MS. CLARK: State appears by Loralee Clark.

MR. BRINCKMAN: Randy Netzer appears in person along with attorney John Brinckman.

MS. CLARK: I'm filing the negotiated plea. Mr. Brinckman has a cipy, right?

MR. BRINCKMAN: Yes, I think I do.

THE COURT: Do you have a guilty plea questionnaire, Mr. Brinckman?

Mr. Netzer, you're entitled to be represented by an attorney. You are represented by Mr. Brinckman. Have you been satisfied with the representation that you received from him?

THE DEFENDANT: Your Honor, umm, I think that Mr. Brinckman where he could in the time that he was provided. I don't know whether he had the time to interview all the witnesses that I had suggested and so forth. I don't really have any knowledge about that.

THE COURT: I'm asking if you're satisfied with the competency of Mr. Brinckman in representing you in this matter, Mr. Netzer.

THE DEFENDANT: Well, Your Honor, I'm just not sure because with all due respect to Mr. Brinckman I would have brought motions to dismiss and so forth but I'm accepting of the plea.

THE COURT: Once again I'll ask the question, Mr. Netzer. Are you satisfied with the representation that you have received from Mr. Brinckman?

THE DEFENDANT: I believe that Mr. Brinckman did the best he could in the short time he had.

THE COURT: I have before me a plea questionnaire and waiver of rights document which I now show you. It contains in there information relative to the rights that you're waiving by entering this plea. Is that your signature that appears on the back of the first page?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you review that carefully with Mr. Brinckman?

THE DEFENDANT: Yes, I did.

THE COURT: And are you satisfied that you fully understand the rights that you're waiving by entering the plea?

THE DEFENDANT: Yes.

THE COURT: In addition you are an attorney licensed to practice in the State of Wisconsin, is that correct?

THE DEFENDANT: Yes.

THE COURT: And as such you would be familiar with the rights that any defendant would waive by ente4ring the plea in this case, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have also reviewed the elements of the offenses for which you are going to enter pleas today. Those are attached to your statement as to negotiated -- or your plea questionnaire, is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And have you reviewed those as well?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And are you satisfied that you fully understand the charges against you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Brinckman, are you satisfied that your client fully understands the rights that he is waiving by entering the pleas?

MR. BRINCKMAN: Yes, he does.

THE COURT: and are you also satisfied

that he fully understands the consequences of the pleas?

MR. BRINCKMAN: He does.

THE COURT: Mr. Netzer, have you had any alcohol, drugs or any other substances which would make it difficult for you to understand what we are doing here today, sir?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you had anything in the last 24 hours?

THE DEFENDANT: No, Yur Honor.

THE COURT: Are you currently receiving any treatment for any mental illness or disorder?

THE DERFENDANT: I'm seeing a counselor.

THE COURT: Okay. Does that -- does that assist you in understanding what occurs here today?

THE DEFENDANT: Yes.

THE COURT: Okay. The plea agreement indicates that in 2000-CM-1490 you will enter a plea to the stalking as alleged in Count 1 of the complaint. The State understands that because you do not believe that you ever intended to hurt the victim that you will be entering an Alford plea to the stalking even though the intent to

hurt is not an element of the offense of stalking.

That's sort of a complicated way of getting it out, Mr. Brinckman, but are you satisfied that Mr. Netzer fully understands the consequences of an Alford plea?

MR. BRINCKMAN: Yes, I think that he does.

THE COURT: Do you understand, Mr. Netzer, that even though you will enter an Alford plea in which you will be contesting that you did not ever intend to hurt the victim, that the court will be free to acdcept your Alford plea and enter a conviction against you for the stalking. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. He will also plead guilty to violation of a restraining order as alleged in Count 2 of the complaint. All other counts will be dismissed but read in as will all other counts in 2001-CM-301. Is that your understanding of the agreement, sir?

THE DEFENDANT: Well, Your Honor, my initial understanding of the agreement was that I was going to make an Alford plea to two counts.

THE COURT: Excuse me? To two counts?

THE DEFENDANT: Yes.

MS. CLARK: Judge, the type of plea is really between the defense and the court. I thought that the stalking was the only count that he had a major problem with. If he wants to enter an Alford plea to both, that's fine.

THE COURT: All right.

MR. BRINCKMAN: Judge, he has a major problem with all of the counts. And as I indicated before in court, with respect to the smaller counts the violations of the restraining orders, not only do we have problems with that but I believe that we have sufficient evidence to prove if not all of those, most of those, incorrect.

The agreement is that he plead to two counts and we didn't really --

THE COURT: All right. The issue is, Mr. Netzer, you wish to plead -- you wish to enter an Alford plea to both counts.

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. The Court will allow you to do that.

All right. With regard then -- have you had

what you believe is sufficient time to in your own mind come to the conclusion that this is what you want to do?

THE DEFENDANT: Sufficient time, yes, Your Honor.

THE COURT: Do you understand that once I accept your pleas and enter the convictions that it will be difficult for you to withdraw your pleas. This is not the kind of thing you wake up tomorrow morning and say oops, I made a mistake, let me take it back. Do you understand that?

THE DEFENDANT: Yews, Your Honor.

THE COURT: All right. Are you prepared to enter your pleas at this time, sir?

THE DEFENDANT: Well the long story is I would have liked to have the opportunity to file my motions to dismiss and that and so forth, but yes the short answer is yes, I'm prepared today.

THE COURT: All right. Count 1 charges stalking. The allegation is that between May of 2000 and October 10 of 2000 in various places in the County of La Crosse and State of Wisconsin you did intentionally engage in a course of

conduct directed to a specific person whose initials are D as in doorknob, N as in Nancy, that would cause a reasonable person to fear bodily injury or death to herself or a member of her immediate family.

The defendant knew that DN would be placeed in reasonable fear of bodily injury or death to herself or member of her immediate family. And the defendant's acts did not induce fear -- excuse me, did induce fear in the person of DN of bodily injury or death to herself or member of the immediate family.

This would be contrary to Wisconsin Statute Section 940.32 paren (2), a class A misdemeanor for which you can receive a punishment not to exceed a fine of $10,000.00, or imprisonment not to exceed nine months, or both.

As to that charge, the State would have the obligation at trial to prove three elements.

First, that you did intentionally engage in a course of conduct directed to this person, did in fact induce fear in her of bodily injury or death to herself or a member of her immediate family.

That the course of conduct would have caused a reasonable person to fear bodily injury or

death to herself or a member of his immediate family.

And the last element is that you knew or should have known that your conduct placed that person in reasonable fear of bodily injury or death to herself or a member of her immediate family.

Do you understand this charge and the penalty that it entails?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Understanding both the crime and the penalty then, sir, what is your plea to Count 1 stalking?

MR. BRINCKMAN: My client would enter an Alford plea, Your Honor.

THE COURT: With regard to Count 2 the charge is violation of harassment injunction.

That on October 2, 2000 in the City and County of La Crosse, Wisconsin the defendant did violate a temporary restraining order or harassment injunction issued under Chapter 813, contrary to Wisconsin Statute Section 813.125 paren (7), a misdemeanor, punishable by a fine not to exceed $1,000.00 or imprisonment for not more than 90 days, or both.

In order to get a conviction under that statute, the State would have to prove with evidence beyond a reasonable doubt again three elements. \

The first one being that you were in fact issued an injunction against you. An injunction is a court order prohibiting a specific conduct.

The second element would require that you committed an act that violated the terms of that injunction.

And the third element requires that you knew that the injunction had been issued and you knew that your acts violated its terms and conditions.

Do you understand the crime and the burden on the State?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Understanding both then the crime and do you understand the penalty as well, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand the court can run the two counts consecutive to each other which would in essence lead to fines of no more than $11,000.00 and time in the county jail for no more than one year. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Understanding both the crime and penalty, sir, what is your plea? Again Mr. Brinckman.

MR. BRINCKMAN: Alford plea, Your Honor.

THE COURT: Court accepts the Alford plea and based upon those pleas does find that the pleas are freely, intelligently and voluntarily made. There is a sufficient factual basis with regard to both Count 1 and Count 2. I accept those pleas and hereby enter convictions against the defendant on Count 1 stalking and Count 2 violation of the injunction.

Do you wish to proceed to sentence?

APPENDIX C

WISCONSIN SUPREME COURT
ORDER DENYING REVIEW

Office of the Clerk
SUPREME COURT OF WISCONSIN
110 East Main Street, Suite 215
P. O. Box 1688
Madison, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640

April 20, 2004

To:

Hon. Ramona A. Gonzalez
La Crosse County Circuit Ct
333 Vine Street
La Crosse, WI 54601

Gregory M. Weber
Assistant Attorney Gen.
P.O. Box 7857
MadisonWI 537077857

Pamela Radtke
LaCrosse Co. Clerk of Cts.
333 Vine Street
La Crosse, WI 54601

Loralee Clark
LaCrosse Co Dep. D.A.
333 Vine St, Rm. 1100
La Crosse, WI 54601

Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601

You are hereby notified that the Court has entered the following order:

No. 03-0249 State v. Randy J. Netzer L.C. #s 01CM0301, 00CM1490

A petition for review pursuant to Wis. Stat. Sec. 808.10 having been filed on behalf of defendant-appellant-petitioner, Randy J. Netzer, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Ct.

APPENDIX D

WISCONSIN SUPREME COURT
ORDER DENYING RECONSIDERATION FOR REVIEW

Office of the Clerk
SUPREME COURT OF WISCONSIN
110 East Main Street, Suite 215
P. O. Box 1688
Madison, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640

May 11, 2004

To:

Hon. Ramona A. Gonzalez
La Crosse County Circuit Ct
333 Vine Street
La Crosse, WI 54601

Gregory M. Weber
Assistant Attorney Gen.
P.O. Box 7857
MadisonWI 537077857

Pamela Radtke
LaCrosse Co. Clerk of Cts.
333 Vine Street
La Crosse, WI 54601

Loralee Clark
LaCrosse Co Dep. D.A.
333 Vine St, Rm. 1100
La Crosse, WI 54601

Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601

You are hereby notified that the Court has entered the following order:

No. 03-0249 State v. Randy J. Netzer L.C. #s 01CM0301, 00CM1490

The court having considered the motion of Defendant-appellant, Randy J. Netzer, to reconsider its April 20, 2004 order denying the petition for review filed in this case, and the court noting that there is no statutory authority permitting a motion for reconsideration of an order denying a pettition for review, Archdiocese of Milwaukee v. City of Milwaukee, 91 Wis 2d 625, 284 NW 2d 29 (1979);

IT IS ORDERED the motion is dismissed. No costs.

Cornelia G. Clark
Clerk of Supreme Ct.

(2)

No. 04-493

Supreme Court, U.S.
FILED
DEC 27 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY, J. NETZER, Petitioner

Vs.

STATE OF WISCONSIN, Respondent.

On Petition For Rehearing
On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals
For the IV District

PETITION FOR REHEARING

Randy J. Netzer
2522 South 13th Place
La Crosse, WI 54601
608-385-7247

PETITION FOR REHEARING

This Petition For Rehearing is a plea to the Court to closely take a second look at the original Petition For Writ Of Certiorari in this case and put in perspective this additional information. Specifically, the competency of petitioner Randy J. Netzer at the plea hearing and leading up to the plea hearing should be considered in determining whether the Alford Pleas in this case, made by Attorney John Brinckman and attributed to Netzer, were knowingly and voluntarily made.

Netzer always believed in his innocence and that the facts in this case, if looked at objectively by the trial court and the prosecutor, would result in the charges being dropped. So Netzer represented himself for 4 months from October 2000 -when he was first charged- until January 2001. During this time Netzer pleaded his case to the prosecutor in a pre-trial conference with the prosecutor not seeming to listen to anything Netzer had to say and Netzer filed 2 Motions To Dismiss which the trial court never responded to and never set for hearing and never heard. With the trial scheduled for February 2001 quickly approaching and the charges not being dropped, Netzer realized that he needed to retain an attorney because he did not know how to conduct a criminal trial or even how to do the necessary preparation for trial. In January 2001, after being turned down for legal assistance from the local not-for-profit legal services entity, Netzer wrote to the trial court to ask for time to hire an attorney but has never gotten a response from the court.

Feeling that the justice system was stacked against him as the court and prosecutor were not being responsive to him but the judge and the prosecutor had pre-existing relationships with the alleged victim as the alleged victim worked, in essence, for both the judge and the prosecutor as first a clerk in La Crosse County Clerk of Circuit Court's Office and then as a clerk in the La Crosse County District Attorney's Office, Netzer decided that without an attorney he would not be able to function at trial. So Netzer became very depressed and, without believing that he could get a fair trial, he began contemplating suicide. As stated in the original Petition For Writ Of Certiorari, Netzer then read Final Exit by Derek Humphreys, phoned Mr. Humphreys to get reassurance about the ease of committing suicide, and bought the helium and tubing needed to perform a "Final Exit type" suicide on himself.

After the suicide attempt failed Netzer's depression did not subside. Netzer did go to a psychologist, Mr. Jeffrey Court, to deal with his depression and he did talk to Mr. Court about his suicide attempt. When Netzer spent more than his life's savings--taking out a loan to hire an attorney--Netzer hoped that not having to deal with trial preparation and the case would alleviate his depression but it did not. This depression only deepened and Netzer became more withdrawn when Netzer found out only days before trial that his attorney, John Brinckman, (1) had not subpoenaed or prepared any witnesses and now some of those witnesses would be unavailable for the trial date, (2) had not gotten any of the exculpatory phone records that Netzer had asked Brinkman to get and now some of those records were destroyed, (3) had not conducted any additional discovery, and

(4) had conversations with the prosecutor about client-lawyer privilege matters - even though the subjects of those discussions would only reinforce Netzer's innocence - and about plea bargain negotiations initiated by Attorney Brinckman without Netzer's authorization.

At the final planned planned meeting between Netzer and Brinckman just days before trial Netzer found out all this information about how unprepared his attorney was and how his attorney had went behind his back to discuss the case and talk about plea deals. Netzer was totally unprepared for this. The result was that Netzer felt he was already dead and did not need suicide anymore. Even Netzer's attorney now was no longer listening to him and without the attorney being prepared for trial or having any witnesses or evidence ready Netzer became all the more withdrawn. From that point on Netzer was like a zombie and just wanted the trial date to pass and lacked competency to deal with everything.

CONCLUSION

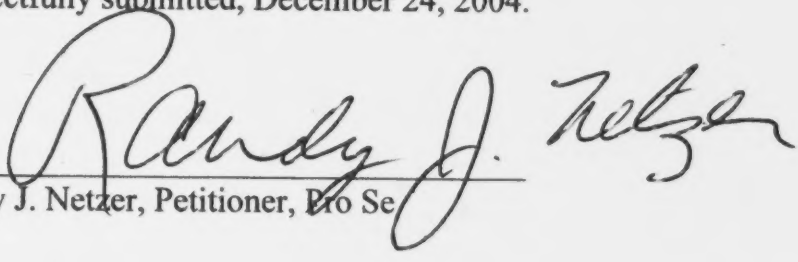
In the original Petition For Writ Of Certiorari issues justifying an order directing the trial court in this case to allow for a motion to withdraw plea were offered, including: (1) Denial of constitutional right to counsel due to the trial court issuing an ultimatum forcing the petitioner, Netzer, to either find/hire an attorney in just 1 business day or represent himself without any preparation in only 2 business days; (2) Inadequate assistance of counsel; and (3) Unauthorized entry of pleas by petitioner's attorney. The competency of the petitioner is intertwined with all of these issues because it is all of these circumstances, individually and cumulatively, that add to the petitioner's depression and ultimate lack of competency in the days immediately before the plea hearing and at the plea hearing.

If a "But For" test were to be applied to any of these issues, including competency, there is substantial basis of proof to justify allowing a motion to withdraw plea. It is the sworn statement of this petitioner as follows: (1) But for the trial court's ultimatum Netzer would have been able to choose an attorney of his choice to represent him and, if the court would have allowed counsel sufficient time to prepare for trial rather than fast-tracking the trial Netzer probably would have had Attorney John Matousek represent him but also would be able to choose from several other attorneys Netzer had contacted; (2) But for the inadequate representation of Attorney Brinckman, Netzer would have (a) had phone records that proved that he did not call the alleged victim after they broke up but that she repeatedly called him thereafter--once more than 7 times in a half hour span, (b) had witnesses prepared and available for trial, and (c) had no conversations with the prosecutor about plea bargains. No one would want or expect the inadequate representation offered in this case and if anyone thinks that they would be willing to accept this representation then they should ask themselves if they would retain an atorney who committed the acts and omissions of this attorney in this case; (3) But for the atorney voicing pleas in this case the petitioner, especially if competent at the time of the plea hearing, would not have made these pleas; (4) But for the incompetency of the petitioner at the time of the plea hearing the pressure from the petitioner's attorney would not have resulted in Alford pleas to stalking and harassment. Atorney Brinckman did not even explain the charges or the consequences of Alford pleas to Netzer so in his incompetent state at the time Netzer did not realize there was a difference between one misdemeanor that was "Class A" and another "Class B" or that and Alford plea would be essentially the same as a guilty or no contest plea.

CERTIFICATION

It is hereby certified that this Petition For Rehearing is restricted to the grounds not previously presented. Information regarding the original Petition For Writ Of Certiorari is only offered to lend perspective and completeness. This Petition For Rehearing is offered in good faith and not for delay.

Respectfully submitted, December 24, 2004.

X 

Randy J. Netzer, Petitioner, Pro Se

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